NO. 46729-1-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

TODD EDWARD FEARS,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR LEWIS COUNTY

The Honorable Richard Brosey, Judge

BRIEF OF APPELLANT

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2. The trial court erred when it found the expert's testimony would not be helpful to the jury.

3. The trial court erred when it concluded Fears's proposed expert testimony improperly infringed on the credibility of state's witness Laura Cohen.

4. The court erred when it found Ross's testimony did not qualify under the *Frye* standard for admissibility.

5. The sentencing court imposed discretionary legal financial obligations without considering Fears's present or future ability to pay them.

6. The pre-printed finding in the judgment and sentence that Fears has the current or future ability to pay legal financial obligations is erroneous.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the trial court committed reversible error when it refused to allow Fears's expert to testify to the negative compounding effect of an initial single photo identification?

2. Whether the trial court abused its discretion when it imposed discretionary legal financial obligations on Fears without considering Fears's individualized present or future ability to pay them?

C. STATEMENT OF THE CASE

1. Procedural Facts

The Lewis County prosecutor charged Fears with residential burglary,[1] theft in the second degree,[2] and attempting to elude a pursuing police vehicle.[3] CP 1-2. A jury heard the case.[4] During trial, the prosecutor orally amended the second-degree theft to third degree theft.[5] RP Trial Day 2 at 45, 92.[6] Fears approved the amendment. RP Trial Day 2 at 45. The jury found Fears guilty of each charge. CP 4-6; RP Trial Day 2 at 134. The court sentenced Fears to 84 months on the burglary, 364 days on the theft, and 14 months on the eluding. CP 11; RP September 30, 2014 at 10. Fears appeals all portions of the judgment and sentence. RP 18.

The court also imposed discretionary legal financial obligations on Fears without any consideration to his present or future ability to pay

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[1] RCW 9A.52.025
[2] RCW 9A.56.040
[3] RCW 46.61.024
[4] There are two volumes of trial verbatim designated herein as RP Trial Day 1 (heard on August 20, 2014) and RP Trial Day 2 (heard on August 21, 2014).
[5] RCW 9A.56.050
[6] No written amended is in the superior court file.

them. RP September 30, 2014 at 10; CP 13. Fears did not object. Id. at 10-11.

2. Trial Testimony

On the morning of May 14, 2014, Laura Cohen took one of her dogs for a walk. RP Trial Day 1 at 32. Cohen lives on 12 fenced acres in Toledo. RP Trial Day 1 at 31. The walk takes about 35 minutes. RP Trial Day 1 at 32. As she started out, she noticed a sports car on the road. The car slowed down. The car's windows were open. Both the driver and the passenger were men. She waved at them. She continued on her walk and the car passed her a second time. RP Trial Day 1 at 34-35.

When she returned home from her walk, she saw the same two men running down her long driveway toward the gate. RP Trial Day 1 at 36. The white car was parked in the driveway. RP Trial Day 1 at 36. She yelled at them and asked them what they were doing. RP Trial Day 1 at 36. One man had a piece of paper in his hand and said he was looking at the house – it was for sale – and he got bit by a pit bull. RP Trial Day 1 at 37. The other man was carrying a backpack. She noticed the pack was swinging as if it had some weight in it. RP Trial Day 1 at 60.

Things did not seem right to Cohen so she looked at the license plate and started yelling at the men that she had the plate by reading the plate. RP Trial Day 1 at 38. The men drove away. RP Trial Day 1 at 37-

38. She identified Fears as the driver. RP Trial Day 1 at 37. Cohen returned to her house and found that a small fire safe containing personal paperwork was missing from the home office. RP Trial Day 1 at 39, 43. All her jewelry was also gone. RP Trial Day 1 at 44. It had been stored in a jewelry box in the guest room. RP Trial Day 1 at 43-44.

She called 911 and gave the dispatcher information about the two men, the car, and the car's license plate. RP Trial Day 1 at 38. The dispatcher radioed Lewis County Sheriff's deputies a description of the car and the area where the apparent burglary occurred. RP Trial Day 1 at 72.

Deputy Jeremy Almond was headed north on the Jackson Highway when a white car sped past him headed south. RP Trial Day 1 at 72. The location was in the general vicinity of the burglary. RP Trial Day 1 at 72. He flipped on his car's siren and lights and turned to follow the car. RP Trial Day 1 at 73. He was wearing a uniform and his patrol car had markings identifying it as a police car. RP Trial Day 1 at 71.

Jackson Highway has s-curves. RP Trial Day 1 at 74. Deputy Almond drove behind the car as fast as he safely could. RP Trial Day 1 at 74. He felt he was close enough at times for anyone in the car to see his lights and to hear his siren. RP Trial Day 1 at 74. At one point, he had to swerve to avoid an object in the road that looked like a lunch pail. RP Trial Day One at 76. The white car got onto I-5 headed southbound. RP

Trial Day 74-75. Deputy Almond followed it onto the freeway and watched as the car passed other cars on the shoulder and entered other lanes of travel moving fast. RP Trial Day 1 at 74-75. He called off the pursuit as he felt it was too dangerous. RP Trial Day 1 at 78. He never got close to the car and could not identify anyone who had been in the car. RP Trial Day 1 at 81, 83. He believed there were two people in the car. RP Trial Day 1 at 84.

Deputy Almond returned to try to find the metal box in the road but it was gone. RP Trial Day 1 at 83. He noticed a lot of paperwork in and around the road where the metal box had been. RP Trial Day 1 at 83. He picked up some of it and gave it to Cohen. RP Trial Day 1 at 85.

Lyle Barker was also driving Jackson Highway that morning. RP Trial Day 2 at 10-11. He saw the metal box by the side of the road and stopped to pick it up. RP Trial Day 2 a 12. Its latch was broken. RP Trial Day 2 at 14. A few days later, he gave the box to the police. It was empty when he picked it up from the side of the road. RP Trial Day 2 at 11, 13.

Marlena Avelar was also driving Jackson Highway. RP Trial Day 2 at 16. She saw a car being chased by a police car. RP Trial Day 2 at 17. She had a friend with her in the car, Iraida Contreras. Contreras is familiar with car types. She identified the pursued car as a Mitsubishi. RP Trial Day 2 at 17. Avelar noticed the car had a black stripe on the driver side.

RP Trial Day 2 at 19-20. At trial, Avelar was shown a picture of the suspect Mitsubishi. It did not have a black stripe on the driver's door. RP Trial Day 2 at 21. She thought that maybe she mistook a dent on the door for a stripe. RP Trial Day 2 at 21. She and Contreras stopped to pick up papers on the road and later turned them over to the police. RP Trial Day 2 at 19.

Dispatch ran the plate number that Cohen had provided but it did not return to a white car. RP Trial Day 1 at 106, 128. Dispatch has a computer program that allows it to search for vehicles with a like-plate and description. RP Trial Day 1 at 106. Using the program, dispatch came up with a white Mitsubishi registered to Tammy Nevills in Kelso. RP Trial Day 1 at 89, 106. The plate Cohen gave dispatch and the plate on Nevills's car were different by one character. Per Nevills, her plate is AOY0695. RP Trial Day 1 at 90. Cohen described the plate number to the police as AOY0395. RP Trial Day 1 at 37. The police contacted Nevills. She told them her boyfriend, Todd Fears, had access to the car. RP Trial Day 1 at 90.

All of this information was developing as Deputy Schlecht was at Cohen's home taking her statement a little after 10 a.m. RP Trial Day 1 at 79, 106. He pulled up Fears' DOL photo on his car's computer and asked her if the photo looked like the white car's driver. RP Trial Day 1 at 107.

Cohen did not make a positive identification. Instead, she told Schlecht the photo looked kind of like the person as they both had a similar facial structure but the driver was bigger. RP Trial Day 1 at 107. She felt the "facial structure" was the same and that the person in her driveway was heavier.

Nevills called the police around 11:30 that morning to report the car stolen. RP Trial Day 1 at 89, 91. She reported that it had been taken from Holt's Quik Chek in Kelso. RP Trial Day 1 at 98. Kelso Police Officer Ken Hocchalter was familiar with Quik Chek and knew it had many security cameras on the outside. RP Trial Day 1 at 98-99. He went to the station and carefully reviewed the recent video recordings. He saw nothing that looked like a small white car being at the station. RP Trial Day 1 at 99-100.

Officer Hocchalter went to talk to Nevills. RP Trial Day 1 at 100. He had her fill out a stolen car report. After she did so, he confronted her about what he had not seen on the Quik Chek surveillance video. RP Trial Day 1 at 101. Nevills then told Officer Hocchalter that she was told to report the car stolen from a "separate store" but she did not know where the store was. RP Trial Day 1 at 101. Finally, she told Hocchalter that Fears called her and asked her to report the car had been stolen from Rocky Point. RP Trial Day 1 at 101-102. Nevills explained at trial that

Fears did not want to make the report himself because he had an active Department of Corrections (DOC) warrant. RP Trial Day 1 at 94. Nevills believed that what Fears had told her about the stolen car was truthful and that Fears had not told her to be untruthful to the police.[7] RP Trial Day 1 at 93. Fears did in fact have a DOC warrant. RP Trial Day 2 at 25.

Three days later, Lewis County Deputy Tyson Brown went to Cohen's home and showed her a photo montage of six persons. RP Trial Day 2 at 27. Without hesitation, Cohen identified Fears at position five in the montage. RP Trial Day 2 at 29. In showing Cohen the montage, Deputy Brown followed his department's protocols. RP Trial Day 2 at 29. He did not tell Cohen beforehand that the suspect was in the montage. RP Trial Day 2 at 28-29.

At trial, Cohen was asked for essentially what was the third time to identify Fears as the car's driver. This time, Cohen had no doubt Fears was the driver. RP Trial Day 1 at 35. Cohen's jewelry, all with personal and sentimental value, had not been recovered and returned to her. RP Trial Day 1 at 40, 67. She identified the safe's value as approximately $30. Trial Day 2 at 40. She could not specify a fair market value for the jewelry as she would never purchase used jewelry. RP Trial Day 41-43.

Fears did not testify. RP Trial Day 2 at 95.

[7] Nevills's son found the car at Rocky Point about four days later. She did not believe the car had been damaged in any way. RP Trial Day 1 at 96-97.

In his defense, Fears sought to admit expert testimony from University of Washington Associate Professor Stephen Ross on the compounded affects of improper eyewitness identification techniques. RP Trial Day 2 at 53-55. Supplemental Designation of Clerk's Papers, Report of Stephen Ross (sub. nom. 41). To support the admission, Ross provided a lengthy offer of proof. RP Trial Day 2 at 66-82. The court found the proffered testimony did not satisfy the Frye[8] standard, was intuitive and thus did not need an expert to explain it, encroached on Cohen's veracity, and there was a strong circumstantial case to convict Fears. RP Trial Day 2 at 86-91.

D. ARGUMENT

1. FEARS WAS DENIED HIS FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS AND HIS CONSTITUTIONAL RIGHT TO PRESENT A DEFENSE WHEN THE TRIAL COURT EXCLUDED THE TESTIMONY OF STEPHEN ROSS.

a. Standard of Review

Constitutional errors are reviewed de novo. *Bellevue School Dist. v. E.S.*, 171 Wn.2d 695, 702, 257 P.3d 570 (2011). Although evidentiary rulings are ordinarily reviewed for an abuse of discretion,[9] this discretion

[8] *Frye v. United States*, 293 F. 1013, 34 A.L.R. 145 (D.C.Cir.1923)

[9] A trial court abuses its discretion when its order is manifestly unreasonable or based on untenable grounds. *State v. Depaz*, 165 Wn.2d 842, 858, 204 P.3d 217 (2009). This

is subject to the requirements of the constitution: a court necessarily abuses its discretion by denying an accused person his constitutional rights. See, e.g. *State v. Iniguez*, 167 Wn.2d 273, 280-81, 217 P.3d 768 (2009). Where the appellant makes a constitutional argument regarding the exclusion of evidence, review is de novo. *Id.*

Constitutional errors are presumed prejudicial, and the prosecution bears the burden of establishing harmlessness beyond a reasonable doubt. *State v. Watt*, 160 Wn.2d 626, 635, 160 P.3d 640 (2007). To overcome the presumption, the State must establish beyond a reasonable doubt that the error was trivial, formal, or merely academic, that it did not prejudice the accused, and that it in no way affected the final outcome of the case. *City of Bellevue v. Lorang,* 140 Wn.2d 19, 32, 992 P.2d 496 (2000). The State must show that any reasonable jury would reach the same result absent the error and that the untainted evidence is so overwhelming it necessarily leads to a finding of guilt. *State v. Burke*, 163 Wn.2d 204, 222, 181 P.3d 1 (2008).

b. Due process guaranteed Fears a meaningful opportunity to present his defense.

The State may not "deprive any person of life, liberty, or property, without due process of law...." U.S. Const. Amend. XIV. The due

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includes reliance on unsupported facts, application of the wrong legal standard, or taking an erroneous view of the law. *State v. Hudson*, 150 Wn. App. 646, 652, 208 P.3d 1236 (2009).

process clause (along with the Sixth Amendment right to compulsory process) guarantees criminal defendants a meaningful opportunity to present a complete defense. *Holmes v. South Carolina*, 547 U.S. 319, 324, 126 S. Ct. 1727, 164 L. Ed. 2d 503 (2006). The accused must be able to present his version of the facts so the fact-finder may decide where the truth lies. *State v. Maupin*, 128 Wn.2d 918, 924, 913 P.2d 808 (1996). The United States Supreme Court has called this right "a fundamental element of due process of law." *Washington v. Texas,* 388 U.S. 14, 18, 87 S. Ct. 1920, 18 L.Ed.2d 1019 (1967).

The right to present a defense includes the right to introduce relevant and admissible evidence. *State v. Lord*, 161 Wn.2d 276, 301, 165 P.3d 1251 (2007). Denial of this right requires reversal unless it can be shown beyond a reasonable doubt that the error did no affect the verdict. *State v. Elliott*, 121 Wn. App. 404, 410, 88 P.3d 435 (2004). An appellate court will not "tolerate prejudicial constitutional error and will reverse unless the error was harmless beyond a reasonable doubt." *State v. Fisher*, 165 Wn.2d 727, 755, 202 P.3d 937 (2009).

Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than would be without the evidence." ER 401. Unless otherwise limited, "all relevant evidence is admissible." ER 402.

The threshold to admit relevant evidence is low; even minimally relevant evidence is admissible. *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 669, 230 P.3d 583 (2010).

c. The exclusion of Stephen Ross's testimony denied Fears his constitutional right to present a defense.

ER 702 governs testimony by experts, providing:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

ER 702. Under the rule, expert testimony is admissible if it will be helpful to the trier of fact. "Helpfulness" is to be construed broadly. *Philippides v. Bernard*, 151 Wn.2d 376, 393, 88 P.3d 939 (2004) (*citing Miller v. Likins*, 109 Wn. App. 140, 148, 34 P.3d 835 (2001). This means the rule favors admissibility in doubtful cases. *Likins*, at 148. Where the accused person seeks to use an expert to challenge the reliability of eyewitness testimony, "[T]he court must carefully consider whether expert testimony on the reliability of eyewitness identification would assist the jury in assessing the reliability of eyewitness testimony. In making this determination the court should consider the proposed testimony and the specific subjects involved in the identification to which the testimony relates[.]" *State v. Cheatam*, 150 Wn.2d 626, 81 P.3d 830 (2003).

Here, the defense sought to admit the expert testimony of Stephen Ross. RP Trial Day 2 at 53-91. The purpose of the evidence was primarily to call into question the legitimacy of Laura Cohen's identification of Fears. Id. Had Ross been allowed to testifiy, he would have explained the science beyond the negative compounding affect of eyewitness identifications that start, as here, with the display of a single picture of the suspect. Scientifically-based psychological testing show that subsequent display of the suspect to the eyewitness builds the witness's confidence that they "picked" the right person even if that "right" person is absolutely innocent. Subsequent exposure to suggestive information can alter the memory and increase the witness's confidence, creating the possibility that erroneous testimony will be delivered with a high degree of confidence.

A confident identification of a suspect by an eye-witness is compelling evidence to a jury. But it is the type of compelling evidence that should be closely scrutinized by the same jury as that confidence was being falsely created with at inception with the showing of a single suspect photo. RP Trial Day 2 at 66-86.

Because of this, expert testimony on the subject is "helpful" within the broad definition of helpfulness adopted by the Supreme Court. *Philippides*, 151 Wn.2d at 393.

Similar expert testimony has been held admissible in other cases. *See e.g., State v. Taylor*, 50 Wn. App. 481, 489, 749 P.2d 181, 184 (1988) ("[E]xpert testimony on the unreliability of eyewitness identification can provide significant assistance to the jury beyond that obtained through cross examination and common sense").

Here, Cohen first saw the person she later identified as Fears in aslow-passing car while she was out walking her dog. There was no reason at that point for her to pay particular attention to the car's driver or to make any sort of mental note as to what he actually looked like. When she next saw that person, he was at a distance and was running down her driveway accompanied by another man. RP Trial Day 1 at 34-37. Cohen responded not by taking a close look at the driver, but by taking the opportunity to try and memorize the license plate of the car the two men got into. RP Trial Day 1 at 38.

After the two men left, Cohen was under the stress of recognizing her home was entered by strangers without her permission and significant personal property was stolen to include here engagement ring, her wedding ring, her husband's wedding ring, and the wedding rings of her deceased parents. RP Trial Day 1 at 39-40. When Deputy Schlecht arrived to investigate, Cohen could tell something was going on with the incident as Schlect was distracted by traffic on his radio and she could

hear the radio traffic. RP Trial Day 1 at 106. Cohen knew she was looking at the suspect when Schlecht showed her Fears's DOL photo. The seed for a later confident identification was planted with the showing of a single photo.

Fears argued that the subsequent viewing of the montage and the positive identification of Fears at trial was tainted by the original single picture. RP Trial Day 2 at 126-30. Without Ross's testimony outlining the problems with perception, memory, and confidence under circumstances such as those presented in this case, jurors were far more likely guided by the erroneous belief that confidence correlated with accuracy. As Ross indicated, in the mind of most jurors, an eyewitness's confidence is the chief determinant of whether or not the witness is believed. RP Trial Day 2 at 56.

Without Ross's testimony, the jury likely gave great deference to Cohen's confidence level, as expressed in the testimonies of both deputies Schlecht and Brown, than was warranted under the circumstances. As a result, the jury was more likely to believe Fears was the burglar and driver. Furthermore, the identity of the person in Cohen's driveway was not merely "any fact that [was] of consequence to the determination of the action;" instead, it was the contested fact at Fears's trial. Ross's testimony would have made it less probable (in the jury's eyes) that Fears was that

person. Thus this testimony was relevant under ER 401 and admissible under ER 402

Because the average juror is unfamiliar with the scientific basis for questioning Cohen's confidence, the testimony would have been "helpful" to the jury under ER 702. It would have helped the jury to "understand the evidence" (Cohen's confidence) and to "determine a fact in issue" (the identity of the burglar). ER 702.

For these reasons, Ross should have been allowed to testify. The exclusion of this evidence prejudiced Fears: without expert testimony, jurors were left with their common-sense understanding that confidence necessarily correlates with accuracy in eyewitness testimony – an idea that has been discredited by scientific studies. Supp. DCP, Stephen Ross Report.

Given the Supreme Court's broad definition of "helpfulness," the evidence should have been admitted. *Philippides,* 151 Wn.2d at 393. By excluding relevant and admissible evidence, the trial court violated Fears's right to present a defense. U.S. Const. Amend XIV; *Holmes*, 547 U.S. 319. Fears's convictions must be reversed and the case remanded for a new trial, with instructions to permit Ross to testify on Fears's behalf. ER 401; ER 402; *Philippides*, supra; *Cheatam*, 150 Wn.2d at 649.

2. THE COURT VIOLATED STATUTORY MANDATE IN FAILING TO CONSIDER FEARS'S ABILITY TO PAY DISCRETIONARY LEGAL FINANCIAL OBLIGATIONS.

The court ordered Fears to pay these discretionary legal financial obligations (LFOs): (1) $124.06 witness costs; (2) $1,800 court-appointed attorney fee; and (3) $3,123.75 defense experts and other defense costs incidentals fee.[10] CP 13; RP September 30, 2014 at 10. The court erred in imposing these LFOs because it failed to make an individualized inquiry into Fears's current and future ability to pay them.

The court may order a defendant to pay costs under RCW 10.01.160. However, the statute also provides "[t]the court shall not order a defendant to pay costs unless the defendant is or will be able to pay them. In determining the amount and method of payment of costs, the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose." RCW 10.01.160(3).

A trial court has a statutory obligation to make an individualized inquiry into a defendant's current and future ability to pay before the court imposes legal financial obligations. *State v. Blazina*, 182 Wn. 2d 827, 344

[10] The court also ordered a $500 victim assessment, a $200 criminal filing fee, and a $100 DNA fee. CP 13. Those fees are not at issue on appeal because they are mandatory. *State v. Lundy*, 176 Wn. App. 96, 102, 308 P.3d 755 (2013).

P.3d 680, 685 (2015). The record reflects no consideration here. RP September 30, 2014 at 10.

In the judgment and sentence, this pre-printed, generic language appears:

> 2.5 Legal Financial Obligations/Restitution. The court has considered the total amount owing, the defendant's present and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change. (RCW 10.01.160).

CP 10.

Fears challenges this finding on the ground that the court did not consider his individual financial resources and the burden of imposing such obligations on him. The boilerplate finding regarding ability to pay lacks support in the record. RP September 30, 2014 at 10.

Further, "the court must do more than sign a judgment and sentence with boilerplate language stating that it engaged in the required inquiry. The record must reflect that the trial court made an individualized inquiry into the defendant's current and future ability to pay." *Blazina*, 344 P.3d at 683. The court failed to follow statutory mandate in imposing the legal financial obligations. The remedy is a new sentence hearing. *Id.*

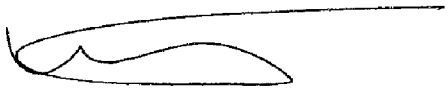
The issue is ripe for review. *Blazina*, 344 P.3d at 683. And although defense counsel did not object below, an appellate court may reach this error consistent with RAP 2.5. *Id.* at 682. Fears requests this

Court reach the merits. The LFO system is broken.[11] *Id.* at 683. It will not be fixed until appellate courts reach the merits of these claims and send cases back for resentencing thereby sending a clear signal to trial judges about the importance of individualized inquiry into ability to pay legal financial obligations.

E. CONCLUSION

Fears convictions should be reversed and remanded for a new trial. Alternatively, the trial court should also hold a hearing to determine Fears's individualized ability to pay LFOs.

Respectfully submitted this 11th day of June 2015.



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[11] Problems associated with LFOs imposed against indigent defendants include increased difficulty in reentering society, the doubtful recoupment of money by the government, and inequities in administration. *Blazina*, 344 P.3d 680, 684.

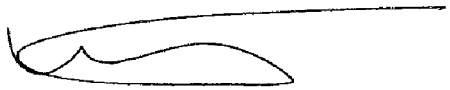
CERTIFICATE OF SERVICE

Lisa E. Tabbut declares as follows:

On today's date, I efiled the Brief of Appellant to (1) Sara I. Beigh, Lewis County Prosecutor's Office, at appeal@lewiscountywa.gov (2) the Court of Appeals, Division II; and (3) I mailed it to Todd Edward Fears/DOC# 336549, Coyote Ridge Corrections Center, PO Box 769, Connell, WA 99326.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed June 11, 2015, in Winthrop, Washington.



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